NO. 22043

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEWELL JAMES WILLIAMS,

Appellant,

vs.

FRANK GIBSON, HENRY A. BONEY,
ROBERT C. DENT, DE GRAFF AUSTIN
and ROBERT C. COZENS as members
of the Board of Supervisors of
San Diego County (State of
California) and JOSEPH C. O'CONNOR,
Sheriff of San Diego County (State
of California),

Appellees.

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On Appeal From the United States
District Court For the Southern
District of California

BRIEF OF AMICUS CURIAE COUNTY OF SAN DIEGO IN SUPPORT OF POSITION OF APPELLEES OTHER THAN THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

Amicus Curiae, at the invitation of this Honorable Court, files this brief in support of the position of Appellees Frank Gibson, Henry A. Boney, Robert C. Dent, De Graff Austin and Robert C. Cozens, as members of the Board of Supervisors of San Diego County, State of California; and Joseph C. O'Connor, Sheriff of San Diego County, State of California, on the question of whether the provisions of the California Tort Claims Act of 1963 (Secs. 810 et seq., Gov. Code) governing liabilities and immunities of public entities and employees and the presentation of claims requirements set forth therein are applicable to an action brought in Federal Court by a federal prisoner confined in a county jail alleging that he was injured while he was confined therein as a result of the negligence of the Sheriff and the members of the Board of Supervisors.

FACTS

This is an action brought under the Federal Tort Claims Act (28 U.S.C.A. Secs. 1346(b) and 2671 et seq.), in the United States District Court for the Southern District of California, Southern Division. The complaint alleges that plaintiff, a federal prisoner confined in the San Diego County jail awaiting trial

in the United States District Court for the Southern District of California, Southern Division, was injured as the result of the negligence of defendants. The defendants are:

(1) Joseph C. O'Connor, Sheriff of County of San Diego, a county officer and by statute charged with the duty and responsibility for providing for the safekeeping of prisoners confined in the county jail.

(2) Frank Gibson, Henry A. Boney, Robert C. Dent, De Graff Austin, and Robert C. Cozens, as members of the Board of Supervisors of the County of San Diego, State of California, who are charged by state statute with the duty of supervising the official conduct of all county officers, including the sheriff.

(3) United States of America which is charged by federal statute with the duty to provide for the safekeeping, care and protection of federal prisoners.

Although the County of San Diego is named as a defendant in the caption to the action herein, there is no allegation in the complaint against the County of San Diego.

The court below granted the motion for dismissal of appellees herein on the grounds that the court did not have jurisdiction over the individual defendants joined in a Federal Tort Claims Act action since an independent basis of federal jurisdiction (i.e., diversity of citizenship or federal question) did not exist and that the plaintiff had failed to allege the filing of a claim with the County of San Diego as required by the California Tort Claims Act of 1963 (Secs. 810 et seq., Gov. Code). The appeal herein is from the order of dismissal.

STATEMENT REGARDING THEORY OF APPEAL

The theory of appellant's cause of action against appellees is not clear. It appears to be premised as follows:

(1) Appellees are federal employees or agents of the United States (i.e., Bureau of Prisons)under the circumstances of this case.

(2) Appellees, as federal employees or agents of the United States (i.e., Bureau of Prisons) are charged with a duty by federal statute (Citing 18 U.S.C.A. Sec. 4042) to provide for the safekeeping of federal prisoners.

(3) The jurisdiction of the Federal Court has been properly invoked against appellees because this is an action arising under a federal statute (i.e., 18 U.S.C.A. Sec. 4042)[1] and, therefore, the provisions of the California Tort Claims Act of 1963 (Secs. 810 et seq., Gov. Code) are inapplicable.

(4) However, if appellee members of the Board of Supervisors are not federal employees, the doctrine of pendent jurisdiction is applicable and permits the Federal Court to properly adjudicate the nonfederal cause of action against such appellee members of the Board of Supervisors.

ARGUMENT

A. THE FEDERAL DISTRICT COURT PROPERLY DISMISSED THE ACTION HEREIN SINCE NEITHER THE SHERIFF OF THE COUNTY OF SAN DIEGO NOR THE MEMBERS OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SAN DIEGO ARE EMPLOYEES, OFFICERS OR AGENTS OF THE UNITED STATES NOR DOES THE FEDERAL STATUTE RELIED UPON BY APPELLANT ESTABLISH A DUTY OF CARE OWED BY APPELLEES TO APPELLANT.

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[1] Appellant expressly negates any suggestion that his action against appellees is based on the Federal Tort Claims Act (Appellants Opening Brief, pages 8, 19).

The Federal Tort Claims Act is a statutory waiver of the traditional immunity of the United States Government from tort liability and imposes liability on the United States for damages resulting from the negligent or wrongful acts or omissions of government employees acting within the scope of thier office or employment where a private person under like circumstances would be liable to the claimant under the law of the state where the act or omission occurred (28 U.S.C.A. Secs. 1346(b) and 2671 et seq.; <u>Indian Towing Company</u> v. <u>United States</u>, 350 U.S. 61, 76 S. Ct. 122, 100 L.Ed. 48 [1955]).

Amicus Curiae concurs with the position of appellees that the Federal Tort Claims Act confers jurisdiction on the federal courts over only the United States itself but that the Act does not confer jurisdiction on the federal courts over individual defendants (Appellees Opening Brief, pages 2-3, 11-12). It is clear that in order to join individually-named defendants with the United States when a person sues under the Federal Tort Claims Act there must be a separate and independent basis of federal jurisdiction to support the claim against such defendants (<u>Wasserman</u> v. <u>Perugini</u> [2nd. Cir. 1949] 173 F.2d 305; <u>Spears</u> v. <u>United States</u> [WDW Va. 1967] 266 F. Supp. 22; 3 Moore's Federal Practice [2nd. Ed.] pages 2738-2739). Appellant concedes these points but

contends that a separate and independent basis of federal jurisdiction does exist in that appellees are federal employees of the Bureau of Prisons and owe a duty of care to federal prisoners as set forth in 18 U.S.C.A. Sec. 4042.

Appellant relies on United States v. Muniz, 374 U.S. 150, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963), which establishes that an action may be maintained under the Federal Tort Claims Act for personal injuries sustained by a federal prisoner confined in a federal penitentiary as a result of the negligent acts or omissions of government employees. The quotation from the Muniz case (Appellant's Opening Brief, pages 17-18) relates to the degree to which state law is applicable in an action under the Federal Tort Claims Act where the duty of care owed by the Bureau of Prisons to federal prisoners confined in federal penal institutions is fixed by federal statute, independent of an inconsistent state statute. In other words while the general tort law of the state is applicable in determining liability, any state law which denies recovery to prisoners against their jailers or against the state, based on principles of sovereign immunity, may not be applied to preclude an action under the Federal Tort Claims Act to recover for injuries sustained by a federal prisoner confined

in a federal penal institution. Since appellant concedes that the action against appellees is not based on the Federal Tort Claims Act (Appellant's Opening Brief, page 8), the Muniz case is not relevant to the issues before this court.

It has been long recognized that a state may refuse to allow the use of their jails and prisons for the commitment and confinement of federal prisoners and where a state so refuses the United States may not lawfully commit or confine a federal prisoner to such jails or prisons (Ex parte Shores [DCND Iowa 1912] 195 Fed. 627). Congress, as early as 1789, recognized this right of a state and requested, by joint resolution, that the various states adopt laws requiring the keepers (e.g., Sheriff) of their jails to receive and safely keep therein under the same penalties as in the case of state prisoners all prisoners committed or confined under the authority of the United States, the United States to pay for the support and keeping of such prisoners (Ex parte Shores [DCND Iowa 1912] 195 Fed. 627).

The Sheriff is a county officer (Sec. 24000, Gov. Code) and has the mandatory duty to "take charge of and keep the county jail and the prisoners in it" (Sec. 26605, Gov. Code; see also Sec. 4000, Pen. Code). Section 4004

of the Penal Code makes it one of the official duties of the sheriff as a state officer to receive and keep federal prisoners committed to the jail where provision is made by the United States for their support (County of Los Angeles v. Cline [1921] 185 Cal. 299, 301). The California Supreme Court in the case of County of Los Angeles v. Cline (1921) 185 Cal. 299, concluded that the sheriff in receiving and maintaining federal prisoners in the county jail pursuant to Section 4004 of the Penal Code (former Section 1601) is not acting for and as the agent of the United States. The court, after reviewing the pertinent state and federal statutes, concluded [at page 302]:

> "The only reasonable deduction from these interrelated provisions of the state and federal laws is that federal prisoners are to be received under the same conditions and subject to the same jurisdiction and control as state prisoners, and are to be fed and provided for in the same manner by the sheriff, subject to contract between the attorney-general and the county authorities for compensation to the county for their maintenance.
>
> ". . . The right of the United States to commit prisoners to the jails or prisons of a state is purely a matter of comity extended by the states and is subject to such demands for compensation as may be determined by contract with the proper authorities. (Ex parte Shores, 195 Fed. 627.)"

Section 4005 of the Penal Code, which finds its original enactment in 1851, is to extends to the United

[illegible]

[illegible]

[illegible]

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> [illegible]

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States as a matter of comity the right to lawfully commit federal prisoners to county jails (County of Los Angeles v. Cline [1921] 185 Cal. 299, 302; Ex parte Shore [DCND Iowa 1912] 195 Fed. 627).

The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General (18 U.S.C.A. Sec. 4001). The Director of the Bureau of Prisons is empowered to contract, for a period not exceeding three years, with the proper authorities of any state or political subdivision thereof for the imprisonment, subsistence, care and proper employment of federal prisoners (18 U.S.C.A. Sec. 4002). As indicated by appellee (Appellees' Opening Brief, page 6), the court below could properly take judicial notice of the contract between the Director of the Bureau of Prisons and the appellees to support its conclusion that appellees are independent contractors (Evans v. Madigan [DC Cal. 1959] 154 F. Supp. 913, 916). Appellant concedes the propriety of the court in taking such judicial notice (Appellant's Reply Brief, page 5).

Notwithstanding the determination by the court below that appellees are independent contractors, it has been long established by both

federal and state court decisions that the sheriff is not an officer or agent of the United States (i.e., Bureau of Prisons) but is merely a jailer for the United States of prisoners committed to a county jail by the federal courts (<u>In re Birdsong</u> [SD Ga. 1889] 39 Fed. 599; <u>Saunders</u> v. <u>United States</u> [DC Me. 1896] 73 Fed. 782; <u>Ex parte Shore</u> [DCND Iowa 1912] 195 Fed. 627; <u>County of Los Angeles</u> v. <u>Cline</u> [1912] 185 Cal. 299).[2] Thus, since the sheriff is not an officer or agent of the United States, it is submitted that the federal statute (18 U.S.C.A. Sec. 4042) relied upon by appellant to establish a duty of care is inapplicable.

Appellant suggests that Section 4006 of the Penal Code "merely acknowledges the force of federal statutes which make the sheriff a federal employee" (Appellant's Opening Brief, page 7). That section provides as follows:

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[2] Appellant's assertion that the determination whether or not appellees are federal employees is governed by 28 U.S.C.A. Sec. 2671 (Appellant's Opening Brief, page 12) seems particularly erroneous since that section specifically applies to the Federal Tort Claims Act and appellant admits that his right to proceed against all appellees is based solely on 18 U.S.C.A. Sec. 4042 and not the Federal Tort Claims Act (Appellant's Opening Brief, page 8).

> "A sheriff, to whose custody a prisoner is committed as provided in the last section, is answerable for his safekeeping in the courts of the United States, according to the laws thereof."

It is clear that Section 4006 of the Penal Code must be read in pari materia with Section 4005 of the Penal Code and that it is no more than a codification of the rule that a keeper of a county jail who receives federal prisoners pursuant to the order of a federal court is subject to that court's jurisdiction to answer for any misconduct towards a prisoner committed to his custody by the federal court (In re Birdsong [SD Ga. 1889] 39 Fed. 599; Ex parte Shore [DCND Iowa 1912] 195 Fed. 627; see also Appellee's Opening Brief, page 3).

The duty of care established by 18 U.S.C.A. Sec. 4042 extends to a federal prisoner from the Bureau of Prisons. Conceivably, a federal prisoner confined in a county jail could maintain a cause of action under that section against employees of the Bureau of Prisons or the United States on the ground that they were negligent in permitting a federal prisoner to remain confined in a county jail (see Appellant's Reply Brief, page 4-5). However it does not follow that a federal prisoner may also use 18 U.S.C.A. Sec. 4042 to impose liability on a

nonfederal employee for the alleged negligence of that employee. Liability, if any, is predicated on state law or possibly the Federal Civil Rights Act (48 U.S.C.A. Sec. 1983), both of which are subject to the provisions of the California Tort Claims Act of 1963 (see e.g., Rubio v. Edmunds [DCCD Cal. 1967] No. 67-927; Williams v. Townsend [DCCD Cal. 1967] No. 67-1086).

Suffice it to say that since the sheriff is not an employee or agent of the United States under the circumstances herein, it is obvious that neither are the members of the board of supervisors. Section 25303 of the Government Code is a recognition of the fact that the board of supervisors is the governing body of a county and constitutes a general grant of power to the board of supervisors to oversee and investigate the activities of the various county officers (see e.g., House v. County of Los Angeles [1894] 104 Cal. 73). To suggest that Section 25303 of the Government Code both makes the members of the board of supervisors federal employees and creates a duty of care owed by the Board of Supervisors to appellant is to strain reason as well as to ignore organizational framework of county government in California.

B. THE LEGISLATIVE HISTORY CLEARLY DEMONSTRATES THAT THE LIMITATION PERIODS INCORPORATED IN THE CLAIMS PROVISIONS OF THE CALIFORNIA TORT CLAIMS ACT OF 1963 WERE INTENDED BY THE LEGISLATURE TO BE APPLICABLE TO ACTIONS BROUGHT BY FEDERAL PRISONERS CONFINED IN COUNTY JAILS AGAINST A PUBLIC ENTITY OR A PUBLIC EMPLOYEE AS THOSE TERMS ARE DEFINED IN THE CALIFORNIA TORT CLAIMS ACT OF 1963.

The California Tort Claims Act of 1963 sets forth the exclusive procedure to be followed by a plaintiff in bringing a claim against a public entity or a public employee for injury resulting from an act or omission occurring in the scope of employment of the public employee (Sec. 950.8, Gov. Code; see also Van Alstyne, California Government Tort Liability, Sec. 10.4, p. 436 and Part V, Notes 2-3, Sec. 950.8, pp. 799-800).

The provisions of the California Tort Claims Act of 1963 make it clear that when a public employee is sued for an act or omission in the scope of his employment, the action is barred by the failure to present a claim to the employing public entity (Sec. 950.2, Gov. Code; Burgdorf v. Funder (1966) 246 Cal.App.2d 443, 447). This is true even where the public entity itself is immune from liability.

Further, the plaintiff must allege in his complaint that he has complied with the claim statute in order to state a cause of action against a public employee (Burgdorf v. Funder (1966) 246 Cal.App.2d 443, 447). Clearly, the sheriff and members of the board of supervisors are public employees of the County of San Diego (Sec. 811.4, Gov. Code [defines "public employee"]; Sec. 811.2, Gov. Code [defines "public entity"]; Sec. 810.2 [defines "employee"]).

Turning to the time element, a claim relating to a cause of action for injury to person must be filed not later than the 100th day after the accrual of the cause of action (Sec. 911.2, Gov. Code). Additionally, a cause of action for such injury may not be maintained against the public employee until the claim has been rejected or has been deemed to have been rejected in whole or in part by the public entity (Sec. 950.6, Gov. Code). Finally, these strict claims provisions apply to prisoners' claims as well as to all other claims (Sec. 945.6(c), Gov. Code). Applying the above claims requirements to the case at bar, it is clear (1) that the alleged cause of action herein arose on or about May 16, 1966; (2) that appellant was required to file a claim with the County of San Diego within 100 days

of that date; (3) that appellant's imprisonment did not exclude him from the claims provision; (4) that appellant did not allege in his complaint that he complied with the claims statute; and (5) that, therefore, appellant has failed to state a cause of action against appellees precluding any recovery based on the complaint on file herein.

The action herein is one seeking relief from the alleged tortious actions of persons acting under color of the statutes of the State of California and, therefore, must be brought in full compliance with the California Tort Claims Act of 1963. The fact that appellant was at the time of injury a federal prisoner committed to and confined in the county jail is not significant since, as previously indicated, it is the status of the alleged wrongdoer that is controlling and appellees are not federal officers or employees. Further, that the Legislature intended the claims procedures and limitations periods provided for by the California Tort Claims Act of 1963 should be applicable to federal prisoners confined in county institutions is obvious from the fact that the Legislature was well aware of the existence of Sections 4005 and 4006 of the Penal Code but conspicuously omitted such persons from the

statutory provisions exempting particular types of claims or causes of action from the provisions of the California Tort Claims Act of 1963.

Contrary to the fears of appellant (Appellants Opening Brief pp. 7, 14), requiring compliance with the claims procedure provisions of the California Tort Claims Act of 1963 does not unduly or unreasonably impair or infringe the rights of a federal prisoner confined in a county jail.

Although a public entity cannot be held liable for any injury to any prisoner (Sec. 844.6(a), Gov. Code), a public employee may be held liable for any injury proximately caused by his negligent or wrongful act or omission (Sec. 844.6(d), Gov. Code). A prisoner is defined to include an inmate of a jail (Sec. 844, Gov. Code). Thus, the law of California provides a federal prisoner confined in a county jail with a right of recovery for negligently inflicted injuries at least equal to that provided federal prisoners under the Federal Tort Claims Act or under 18 U.S.C.A. Sec. 4042 who are confined in federal penal institutions.

CONCLUSION

For the reasons stated, it is respectfully urged by amicus curiae that the decision of the court below must be affirmed.

Respectfully submitted,

BERTRAM McLEES, JR., County Counsel

By Lloyd M. Harmon Jr.,
LLOYD M. HARMON, JR., Deputy
Attorneys for Appellees.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERTRAM McLEES, JR., County Counsel

By Lloyd M. Harmon Jr.
LLOYD M. HARMON, JR., Deputy